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Nos. 73 and 74

# In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL MARITIME BOARD, PETITIONER

*v.*

ISBRANDTSEN COMPANY, INC., ET AL.

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

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No. 73

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## BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

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### OPINIONS BELOW

The majority and concurring opinions of the Court of Appeals (R. 237–248) are reported in 239 F. 2d 933.

### JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1956 (R. 248). The petitions for writs

of certiorari were filed on February 1, 1957, and were granted on March 25, 1957 (R. 250). The jurisdiction of this Court rests on 5 U. S. C. 1040 and 28 U. S. C. 1254 (1).

## QUESTION PRESENTED

Whether the "dual-rate" system of ocean freight rates, under which shippers who refuse to sign exclusive patronage agreements with members of an association of carriers pay substantially higher rates for the identical transportation service than shippers who sign such agreements, is *per se* illegal under the Shipping Act of 1916 and therefore beyond the power of the Federal Maritime Board to approve under Section 15 of that Act.

## STATUTE INVOLVED

Pertinent provisions of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U. S. C. 801, *et seq.*, are set forth in the Appendix, *infra*, pp. 62–65.

## STATEMENT

The issue before the Court is the validity of an order of the Federal Maritime Board (petitioner in No. 73) authorizing the Japan-Atlantic and Gulf Freight Conference ("the Conference"), (a petitioner in No. 74) to institute a "dual-rate" system, under which shippers who refuse to sign exclusive patronage contracts with carrier members of the Conference are charged 9½% more for the identical transportation service than shippers who sign such contracts. Respondents United States and the Secretary of Agriculture contend, as the court below held, that the dual-rate

system is illegal under the Shipping Act, 1916, and that the Board therefore erred in approving it.

Under the prehearing stipulation in the Court of Appeals, the validity of the Board's order is to be determined "on the basis of the facts * * * as found by the Board" (R. 232, 234). The following statement is based on those facts.

## 1. THE FACTUAL BACKGROUND

### A. THE OPERATIONS OF THE CONFERENCE IN THE JAPAN-ATLANTIC TRADE

The Conference is a voluntary association of 17 ocean steamship lines operating between Japan, Korea, and Okinawa, and the Gulf and Atlantic Coasts of North America (R. 23). Five of these lines are American, eight are Japanese, and four are of other nations (R. 23, n. 4). The Conference and its predecessors have operated since 1922 under successive conference agreements, the first of which was approved by the Board in 1926 (R. 23).[1] The current agreement was approved in 1934 (R. 24).

Private steamship operations between Japan and the United States ceased in December 1941 following the outbreak of war between the two countries (R. 24). Such trade was resumed in March 1946 to carry

[1] The Federal Maritime Board and its predecessors are hereinafter sometimes collectively called the "Board." Its predecessors were the United States Shipping Board (1916 to 1933); Department of Commerce United States Shipping Board Bureau (1933 to 1936); and United States Maritime Commission (1936 to 1950). See *Far East Conference v. United States*, 342 U. S. 570, 571, note 2.

cargoes of the Allied occupying powers (R. 24). Although the Conference continued nominally to exist during the war, it was formally re-established in Japan in December 1948 (R. 24). Japanese lines did not reenter the trade until 1951 and 1952 (R. 27–28).

The current Conference agreement does not authorize the use of a dual-rate system (R. 24). From 1928 to 1941, however, the Conference employed such a system for various commodities (R. 24). During that period, due "at least in part" to that system, the Conference had no direct liner competition and little tramp ship competition (R. 25).

B. THE COMPETITIVE RELATIONSHIP BETWEEN ISBRANDTSEN AND THE CONFERENCE

Petitioner Isbrandtsen has been the sole non-conference line which has maintained a berth service in the post-war Japan-Atlantic trade (R. 25). Since early 1949, Isbrandtsen has operated an approximately fortnightly service from Japan to the United States as part of its eastbound round-the-world service (R. 25). None of Isbrandtsen's vessels is equipped with refrigerated space or special silkrooms, as are many of the Conference vessels (R. 25). Although Conference membership is open to any common carrier operating, or intending to operate, regularly in the trade, Isbrandtsen "as a matter of policy" has declined to join the Conference (R. 25.)

The following table shows the comparative sailings and carryings of Isbrandtsen and the Conference lines in the trade from January 1949 to July 1953 (R. 27):

| Calendar year | Number of sailings | | | Cargo carried (revenue tons) | | | Average carryings per sailings | | Percentage of total liner cargo | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Isbrandtsen | Conf. | Total | Isbrandtsen | Conf. | Total | Isbrandtsen | Conf. | Isbrandtsen | Conf. |
| 1949 | 6 | 103 | 109 | 18,099 | 135,635 | 153,734 | 3,016 | 1,317 | 12 | 88 |
| 1950 | 21 | 137 | 158 | 120,381 | 229,829 | 350,210 | 5,780 | 1,678 | 34 | 66 |
| 1951 | 21 | 174 | 195 | 93,450 | 219,343 | 312,793 | 4,450 | 1,261 | 30 | 70 |
| 1952 | 24 | 221 | 245 | 98,834 | 281,308 | 380,142 | 4,118 | 1,273 | 26 | 74 |
| 1953 — 6 months | 12 | 153 | 165 | 37,308 | 189,503 | 226,811 | 3,109 | 1,239 | 16 | 84 |

The trade from Japan to the Atlantic Coast of the United States is at present overtonnaged, and both Isbrandtsen and Conference vessels have "substantial free and usable space" after completion of loading in Japan (R. 28).[2] Total sailings in the trade rose from 109 in 1949 to more than 300 in 1953 (R. 27). The reentry of the Japanese lines in 1951 and 1952 "greatly contributed" to this excessive tonnage. For the years 1951, 1952, and the first 6 months of 1953, the Japanese lines carried approximately 15%, 49%, and 66%, respectively, of the trade's total liner cargo; during the same period United States flag lines (including Isbrandtsen, but excluding two Conference lines) carried 46%, 34%, and 21% of the trade, respectively (R. 27–28).[3]

C. THE TRADE RATE STRUCTURE AND THE RATE WAR

Between 1947 and March 12, 1953, Isbrandtsen's rates, on the average, were approximately 10% below

[2] Most of the Conference vessels commence loading inbound cargo for the United States in the Philippines, proceed to Hong Kong, and complete loading in Japan; they discharge cargo at Pacific, Gulf, and Atlantic ports of the United States (R. 25–26). The amount of cargo which moves from Japan to the Gulf ports is small in comparison to cargo moving to Atlantic ports (R. 26).

[3] In 1950 they carried 53% of the trade (R. 28).

the corresponding Conference tariff rates (R. 29). "As a matter of policy, Isbrandtsen quotes rates lower than those of its competitors, but never knowingly quotes a non-compensatory rate" (R. 29). Prior to the outbreak of the rate war in 1953, both Isbrandtsen's and the Conference's rates were "stable, *i. e.*, constant for relatively long periods of time," due in large part to the "reluctance" of the Conference to reduce its rates to Isbrandtsen's level (R. 29). The level of Conference rates "gradually increased" between 1947 and November 15, 1952, and Conference rate increases were followed by Isbrandtsen increases (R. 28–29). In November 1952 the Conference announced a 10% reduction in rates, and Isbrandtsen announced that its new rates would be 10% lower than the new Conference rates (R. 29).

Most shippers in the trade are "primarily interested in low, uniform and stable freight rates" (R. 29). While Japanese shippers tend to favor Japanese lines, this tendency is limited "to a large extent" by their desire for lower rates, as evidenced by the volume which Isbrandtsen has carried in the trade (R. 29–30). Various shippers considered that the level of Conference rates was "too high" prior to March 12, 1953 (R. 30).

At a special meeting held on March 12, 1953, the Conference voted to "open" Conference tariff rates on 10 major commodities moving in the trade, that is, to release Conference members from their obligation to observe the published tariffs (R. 30). This step was directed at non-conference competition and the rumored rebating by member lines; it was also

"hoped" that the "rate war would lead to Isbrandtsen's joining the Conference or to the institution of the dual rate system or other system" (R. 31). Since that meeting, the Conference has opened rates on most of the commodities that move in substantial volume in the trade, except for refrigerated cargo (R. 30) which Isbrandtsen does not carry (R. 25).

After March 12, 1953, the level of rates dropped, first to about 80% and later to about 30% to 40% of the pre-March 12 level. On a "fairly large number of items", some lines have charged rates as low as $6.00–$6.50 per ton, as against handling costs alone of approximately $8.50 per ton (R. 31). Isbrandtsen attempted to keep on a competitive basis in the rate war until mid-May 1953, when it set minimum rates of first $15.00 and later $12.00 per ton to the Atlantic Coast. Such minimum rates "adversely affected" Isbrandtsen's competitive position in the trade (R. 31). Effective July 15, 1953, Isbrandtsen set its rates at 50% of the pre-March 12 rates, and since that date it "has carried little cargo in the trade" (R. 31). "Many Japanese shippers have requested the conference to close rates and to end the rate war" (R. 32).

### 2. THE BOARD PROCEEDINGS

On December 24, 1952, the Conference filed with the Board, pursuant to the latter's General Order 76,[4]

[4] Section 236.3 of that order, 17 F. R. 10175, 46 C. F. R. 236.3, requires steamship conferences proposing to establish dual rates to file with the Board at least 30 days prior to the initiation of such rates a statement containing: (1) the amount of the differential between the contract and non-contract rates; (2) the effective date of such rates; (3) the reasons for the use of the dual-rate

a statement proposing to initiate 30 days thereafter a dual-rate system in the Japan-Atlantic trade (R. 19–20). Under the proposed system, shippers who refused to sign an exclusive patronage contract with the Conference would be charged rates for the same transportation service 9½% higher than the rates charged shippers who signed such contracts (R. 20). The proposed contract provided that a signing shipper who patronized a non-conference carrier would incur "liquidated damage" equal to 50% of the contract rate on the shipment (R. 36). The contract would be for an indefinite period, terminable by either party on three months notice (R. 35). Although the Conference members agreed "to maintain a shipping service adequate to meet the reasonable requirements of the trade," they did not "agree to respond in damages in the event of any inadequacy of service" (R. 36).[5]

Protests against the proposed dual-rate system were filed by Isbrandtsen and by the Department of Justice (R. 20), and the Department of Agriculture intervened in opposition to the proposal (R. 22).[6] The

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system in the particular trade involved, and the basis for the differential between the rates; and (4) copies of the form of all contracts pertaining thereto.

[5] However, a shipper may secure space elsewhere if, upon application, he is not notified within three days of the availability of space on Conference vessels within the following 15 days (R. 36).

[6] The Secretary of Agriculture intervened before the Board to represent agricultural interests in obtaining equitable transportation rates and service for shipments of agricultural products, and to represent the Department of Agriculture's direct interest as one of the largest agricultural shippers in the world. Under Section 203 (j) of the Agricultural Marketing Act of 1946 (7 U. S. C. 1622 (j)), the Secretary is authorized and directed to assist in

Board set the proposal for hearing, but refused to suspend operation of the system pending the hearing, as the protestants had requested (R. 20–21). On petition for review filed by Isbrandtsen, the court below held that Section 15 of the Act required the Board to approve the dual-rate system before it could be initiated, and enjoined the Conference from putting the system into operation until and unless it had been so approved. *Isbrandtsen Co.* v. *United States, et al.*, 211 F. 2d 51 (C. A. D. C.), certiorari denied, 347 U. S. 990.

Extensive hearings were held before an examiner and, after further administrative proceedings, the Board on December 14, 1955, issued its Report (R. 19–69) and Order (R. 73–76) approving (effective

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obtaining equitable and reasonable transportation rates and services for agricultural products by making complaint to the Federal Maritime Board and to other federal and state transportation regulatory bodies. Cf. also Section 201 of the Agricultural Adjustment Act of 1938, 7 U. S. C. 1291 (a) and (b), which authorizes the Secretary to participate in rate proceedings before the Interstate Commerce Commission relating to the transportation of farm products. The Department of Agriculture owns large quantities of farm products, substantial parts of which have been and will continue to be exported via ocean-going vessels.

The Secretary has also intervened in a number of other Board proceedings in which the validity of dual-rate systems has been challenged. The Secretary's interest is primarily in the legality of the dual-rate system and its interference with the free flow of agricultural exports. The total value of United States Agricultural exports for the twelve months beginning July 1, 1955, was 3.492 billion dollars. Foreign Agricultural Trade, published by United States Department of Agriculture, Foreign Agricultural Service (January 1957), p. 41.

January 1, 1956) the Conference application to institute the dual-rate system. The Board held (1) that the system "is, in itself, lawful, and does not require our disapproval unless, under the facts adduced in a particular case," it would be unjustly discriminatory and unfair as between shippers, carriers, etc., would operate to the detriment of the commerce of the United States, or would be in violation of the Act (R. 60); and (2) that the system's "prima facie discrimination against shippers and the increased tendency toward monopoly" were outweighed by its "foreseeable advantages" (primarily the stability of rates and service which it would produce) (R. 67), and that its employment therefore was reasonable because it was "a necessary competitive measure to offset the effect of non-conference competition in this trade" (R. 60).

The Board rejected the contention that the system is unlawful under Section 14, Third, of the Act, which prohibits any carrier from retaliating against any shipper by refusing available space or resorting to "other discriminating or unfair methods, because such shipper has patronized any other carrier * * * or for any other reason" (R. 37-60). It stated (R. 58) that the higher rate charged a shipper who refuses to sign an exclusive patronage contract is not "charged as a retaliation for 'patronizing any other carrier' * * * [but] because the shipper does not sign the contract, regardless of whether or not he patronizes any other carrier." Further, it held (R. 58) that Section 14,

Third, does not prohibit all discriminations, but only "unjust" ones, and that the "prima facie discrimination against shippers inherent in dual rate systems" (R. 59) is not "unjust" where, as here, it is a "necessary competitive measure to offset the effect of non-conference competition" in the trade (R. 60).[7]

### 3. THE DECISION OF THE COURT OF APPEALS[8]

The Court of Appeals set aside the Board's order on the ground that the dual-rate system constitutes a form of retaliatory discrimination against shippers in violation of Section 14, Third.

There were two opinions, in both of which all mem-

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[7] The Board stated (R. 61–62) that the dual-rate system, "by creating a basic core of cargo on which the conference can rely for the period of the contracts, will eliminate, for that period, the pressure on conference lines to reduce rates to meet Isbrandtsen's lower rate competition and will thereby create greater stability of rates and service, facilitate forward trading by shippers, and decrease the threat of rate wars." It also held (R. 62) that the 9½% differential between the contract and non-contract rates was, with certain exceptions, reasonable in relation to its probable effect on shippers and on the competitive position of Isbrandtsen. It concluded (R. 62) that, as to commodities capable of being carried by both Isbrandtsen and Conference vessels, the spread was "large enough to furnish protection to the conference lines against inducements to shippers offered by Isbrandtsen and small enough to enable Isbrandtsen to remain competitive with the conference." The Board found it "probable" that Isbrandtsen will retain 10% or more of the cargo moving in the trade as against the 26% which it carried in 1952 (R. 62), and stated (R. 62) that Isbrandtsen's 10% would be "an equitable share of the trade."

[8] The United States (a statutory respondent below) and the Secretary of Agriculture (an intervenor below) both supported Isbrandtsen in challenging the Board's order.

bers of the panel concurred (R. 245, 246). In the principal opinion (R. 238–246), written by Judge Fahy, the court ruled (R. 242) that, although the higher rate charged to non-signers of the exclusive patronage agreements was "in terms" for failure to enter into such agreement, "in reality" it was for actually shipping via a non-conference carrier; that the provision for liquidated damages for breach of the agreement is "part and parcel of the dual-rate system and gives color to the whole"; and that both of these provisions "come within a fair meaning of retaliation." The court pointed out (*ibid.*) that Section 14, Third, applies "not only to retaliation for shipping by another carrier but for 'any other reason,' which would include failure to enter into the exclusive contract arrangement." It held (R. 243) that under these circumstances "the charge of a higher rate for the same service and facilities, or the imposition of the liquidated damages, is prima facie discriminatory," and that Section 14, Third, provides that "retaliation * * * may not be resorted to when discriminatory" (R. 244). The court further held (R. 244–245) that adjudicated cases had not decided the legality of the system, and it found no support in the legislative history of the Act for the Board's contention that Congress implicitly had authorized the system.

Judge Washington's concurring opinion (R. 246–248) dealt primarily with the Board's contention that Congress was familiar with dual-rate agreements when it enacted the Shipping Act, and that its failure in terms to outlaw such agreements, while flatly prohibiting such other anticompetitive practices as de-

ferred rebates and fighting ships, demonstrates an implied Congressional endorsement of this device (R. 247).[9] Rejecting this contention, the opinion states (*ibid.*) that the contracts which Congress considered were "bona fide requirements contracts" and "were materially different from the contracts before us now," and that "[i]mplied congressional approval of a bona fide requirements contract is no basis for exempting the contracts in this case from the plain meaning of 'discriminating or unfair methods'" (R. 248).

## SUMMARY OF ARGUMENT

Section 15 of the Shipping Act prohibits, unless approved by the Board, agreements among ocean carriers fixing rates, giving special rates, or preventing or destroying competition; and provides for Board disapproval of any agreement that is "unjustly discriminatory * * * as between * * * shippers * * * or * * * in violation of" the Act. Agreements approved by the Board are exempted from the antitrust laws. Section 14 of the Act makes it illegal for any carrier to give any shipper a "deferred rebate" (Subsection First), to use a "fighting ship" (Subsection Second), or to "[r]etaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such

[9] Judge Washington also stated (R. 246) that the dual-rate system constituted "retaliation" under Section 14, Third, because "in actual practice * * * [it] is being used to penalize a shipper because he has patronized another carrier, or at least reserved the right to do so."

shipper has patronized any other carrier * * * or for any other reason" (Subsection Third).

The court below held that the Conference's dual-rate system, under which a shipper who refuses to sign an exclusive patronage contract with the conference is charged 9½% more for the same transportation service than a shipper who signs such agreement, and liquidated damages of 50% are imposed upon a shipper who patronizes a competitor in violation of such agreement, constitutes retaliatory discrimination under Section 14, Third. We submit that this holding is correct, and that the dual-rate system also violates the prohibition in Section 14, Third, against "unfair" methods.

A. 1. Since there is no difference in the cost or value of services rendered to two shippers, one of whom signs an exclusive patronage contract and the other of whom does not, the 9½% arbitrary differential plainly is retaliation against a non-signing shipper "because such shipper has patronized any other carrier."

The Board's contention that Section 14, Third, prohibits only retaliation because of actual patronage of competitors, and not because of refusal to agree not to do so, attaches undue significance to the mere form of the transaction. Furthermore, the Act prohibits retaliation not only for patronizing another carrier but also "for any other reason."

The Board's construction would open the door to serious evasion of the Act. Under its view that only retaliation because of actual patronage of a competitor is forbidden, a carrier could refuse available

space because a shipper has refused to sign an exclusive patronage agreement, even though the statute flatly prohibits space refusal for patronizing other carriers.

2. The dual-rate system, under which two different rates are charged for the same transportation system, violates the prohibition in Section 14, Third, against resorting to "other discriminating * * * methods." The statute cannot be limited, as the Board construes it, as condemning only "unjust" discrimination. It broadly condemns all discrimination based on a shipper's refusal to give all his business to particular carriers. The legislative history of the Act indicates that the unqualified prohibition of all discriminatory methods was deliberate, not inadvertent, and that Congress intended to prohibit *any*, and not merely "unjust," discrimination.

But assuming *arguendo* that Section 14, Third, prohibits only "unjust" discrimination, that would not legalize the dual-rate system. A differential in rates may be justified under a statute prohibiting "unjust" discrimination only if it has some reasonable relation to the amount of differences in services provided. Here, however, there is not even a pretense of difference in service. Accordingly, by any known standard of transportation law, the differential must be regarded as wholly arbitrary and therefore "unjustly" discriminatory.

3. The legislative history of the Act does not support petitioners' contention that Section 14, Third, prohibits only retaliatory discrimination with respect to services, and not with respect to rates. The pur-

pose of the Shipping Act—to prevent conferences from using their concerted economic power to drive independent carriers out of the field—would be seriously impeded if Section 14, Third, were given such a restrictive interpretation. Nor is such an interpretation required under the *ejusdem generis* rule relied upon by the petitioners.

B. The dual-rate system is also unlawful under Section 14, Third, as an "unfair" method used against independent shippers. Congress deemed it unfair to refuse available space to a shipper because he has patronized another carrier; it is equally unfair to offer the space only at a penalty rate. Similarly, if deferred rebates and fighting ships are unfair, it is also unfair to impose substantial penalties in the form of increased rates in order to coerce shippers to abandon their freedom to patronize carriers of their choice.

C. The legislative history of the Act does not reflect any implied Congressional approval of the dual-rate system. Instead, it shows a purpose to outlaw all discriminatory practices by ocean carriers based on shippers' refusals to patronize such carriers exclusively.

1. Contrary to petitioners' contention, the "joint contracts made by the conference as a whole" before the Alexander Committee were not comparable to the dual-rate system as it now exists. Such "joint contracts" were the exception and not the rule; most of the contracts were made by individual carriers. The economic impact of the latter type of contracts, both on shippers and on nonconference carriers, is

relatively negligible in comparison with the impact of the conference system involved in the instant case.

Furthermore, there was no uniformity in the contracts before the Alexander Committee as to either the differential between the contract and non-contract rates, or the way in which the differential was determined. The contract shipper was not necessarily guaranteed a lower rate for the duration of his contract, but only the same rate. Many of the contracts before the Committee were for fixed periods, whereas the present contracts are of indefinite duration. In sum, the exclusive dealing contracts before the Alexander Committee, unlike deferred rebates and fighting ships, were not primarily used against non-conference line competition but rather to enable particular carriers to secure desirable business.

2. There is no basis for the Board's contention that the principal feature of the deferred rebate system which the Committee found objectionable was that the shipper was kept in continual dependence upon the conference until he obtained his rebate—an evil allegedly not present in the dual-rate system. The basic vice of the deferred rebate system was that the shipper "*is prevented from patronizing any other service* since that act would mean the forfeiture of all accumulated rebates" (Alex. Rep., p. 287, emphasis added). Since most shippers require a regular service (which the independents do not supply), they are required to use conference carriers (which have more frequent sailings).

The actual coercive effect of the dual-rate system upon shippers and independent carriers is substan-

tially the same as the deferred rebate system. Each subjects a shipper who wishes to patronize independent carriers to heavy penalties in the way of substantially higher rates, and each places serious competitive obstacles in the way of the independent carrier. And just as a shipper under the deferred rebate system loses the rebate if it subsequently patronizes an independent carrier, so a signatory of the exclusive patronage agreement has to pay a substantial penalty by way of "liquidated damages" if he chooses to deal with a conference competitor.

We think it would have been anomalous for Congress to have prohibited deferred rebates and at the same time to have sanctioned other devices which have an equally coercive effect upon shippers. A more logical reading of Section 14, and one which effectuates the basic purpose of protecting the independent carriers from conference predatory practices, is that Congress specified the principal unfair practices then employed (deferred rebates and fighting ships), and then went on to condemn all "other discriminating or unfair methods" which might be used to coerce shippers into boycotting independent carriers.

D. The decisions of the Board with respect to the *per se* invalidity of the dual-rate system, as the late Judge Frank declared (96 F. Supp. 883, 890–891), "have lacked uniformity and consistency," and they are entitled to "little weight." In the first case in which the Board considered the problem (in 1922), it held illegal, as unlawfully discriminatory, the use of the system by a single carrier. Eleven years later

(1933), when the Board for the first time upheld the collective use of the system by an entire conference, it distinguished its earlier decision largely on the extraordinary ground that the conference system gives a "choice of carriers" to shippers who sign the exclusive dealing contracts. This distinction, which completely reverses the usual rule that conduct legal when done individually may become illegal when done collectively, was in turn subsequently abandoned by the Board, but has now again been adopted.

In view of the inconsistent position which the Board has taken on this issue, and the fact that the Board did not uphold the legality of a conference dual-rate system until seventeen years after enactment of the statute, the Board's rulings cannot be treated as an authoritative exposition of Congressional intent. On the contrary, the Board's early construction of the Act appears to support the decision below.

E. This Court has not passed on the validity *per se* of the dual-rate system. Of the three cases upon which petitioners rely, two of them (*United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, and *Far East Conference* v. *United States*, 342 U. S. 570) held only that the dual-rate system could not be directly challenged in an antitrust suit, but that the Board's primary jurisdiction must be invoked by filing a complaint under the Shipping Act. The holding in those cases that the Board, and not the courts, should pass upon the legality of the system under the Shipping Act, was not equivalent to holding that the Board could properly approve the system.

For the basis of the doctrine of primary jurisdiction is that agency determination of certain legal and factual questions either may render unnecessary the adjudication of broader legal questions (such as the *per se* validity of the dual-rate system), or, if such questions ultimately are reached, will aid the courts in determining them.

In the third case upon which petitioners rely, *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, the validity of the dual-rate system under Section 14 was not in issue. There this Court upheld the Board's finding that a particular dual-rate system violated Section 16 of the Act, which prohibits "undue or unreasonable preference or advantage." Since the Court upheld the administrative finding that on the particular facts of that case the system could not be approved, it did not reach the broader issues of legality under another section of the Act. Indeed, it is hardly likely that this Court would have determined a question which the Conference itself has characterized as "of Paramount Public Importance" without explicitly so stating and without enunciating the basis for its ruling.

## ARGUMENT

### THE DUAL-RATE SYSTEM IS ILLEGAL UNDER SECTION 14, THIRD, OF THE SHIPPING ACT, 1916, BECAUSE IT IMPOSES SANCTIONS ON SHIPPERS FOR REFUSAL TO GIVE THEIR EXCLUSIVE PATRONAGE TO CONFERENCE CARRIERS

Section 15 of the Shipping Act, 1916, makes "unlawful," unless approved by the Board, all agreements among common carriers by water fixing or reg-

ulating transportation rates, giving special rates, or controlling, regulating, preventing, or destroying competition. It further provides that the Board "may * * * disapprove, cancel or modify any agreement * * * that it finds to be *unjustly discriminatory* * * * *as between* * * * shippers * * * or to operate to the detriment of the commerce of the United States, or *to be in violation of this Act,* and shall approve all other agreements, modifications or cancellations" (emphasis added). Agreements properly approved by the Board are exempted from the antitrust laws.

Section 14 of the Act outlaws various anticompetitive practices in the shipping industry. It prohibits carriers from giving shippers any "deferred rebate" (Section 14, First), or using a "fighting ship" (defined as a vessel used "for the purpose of excluding, preventing or reducing competition by driving another carrier out of said trade") (Section 14, Second). Section 14, Third, makes it illegal for any carrier to

> *Retaliate against any shipper* by refusing, or threatening to refuse, space accommodations when such are available, or *resort to other discriminating or unfair methods, because such shipper has patronized any other carrier* or has filed a complaint charging unfair treatment, *or for any other reason.* [Emphasis added.]

The Court of Appeals, in setting aside the Board's order approving a conference dual-rate system, held that the charging of a higher rate to a shipper who refuses to agree to boycott competing carriers, as well as the imposition of liquidated damages of 50% upon

a shipper who patronizes a competitor in violation of such an agreement, constitutes discriminatory retaliation within the meaning of Section 14, Third.

We shall show that this holding is correct, and that the dual-rate system also runs afoul of the prohibition in Section 14, Third, against "unfair" methods. We believe that these conclusions follow from the language of the statute; from its legislative history, reflecting a Congressional purpose to prohibit conferences of ocean carriers from using their concerted economic power to injure independent competitors; and from the incongruity of a construction which would permit use of an anticompetitive practice (the dual-rate system) whose economic impact upon shippers and independent carriers is not significantly different from that of another anticompetitive practice (the deferred rebate) explicitly prohibited by Congress.

A. THE CHARGING OF AN ARBITRARILY HIGHER RATE TO A NON-SIGNING SHIPPER BECAUSE OF HIS REFUSAL TO AGREE TO BOYCOTT INDEPENDENT CARRIERS CONSTITUTES RETALIATORY DISCRIMINATION PROHIBITED BY SECTION 14, THIRD

1. *The higher rate is retaliatory*

As the Board has conceded (R. 35), there is "no difference in the cost or value of service rendered to two shippers" one of whom signs an exclusive patronage contract and the other of whom does not. The 9½% differential is thus wholly arbitrary in terms of cost justification; the sole reason the non-signer pays substantially more for the identical transportation service is that he refuses to boycott competitors of the conference. A plainer case of retaliation against

a shipper "because such shipper has patronized any other carrier" would be hard to imagine.

The Board held (R. 58), and here urges (Br. No. 73, p. 22, n. 10), that since the higher rate is charged because the shipper refuses to sign an agreement not to patronize other carriers, it is not charged in retaliation for patronizing such carrier. But this construction places undue emphasis on the mere form of the transaction and departs too far from the reality of the conference dual-rate system. As the Court of Appeals pointed out (R. 242), "[w]hen the latter [the higher non-contract rate] is charged a shipper who has not entered into an exclusive patronage contract the substance of the matter is that a higher rate is charged because he ships by other than Conference carriers. The industry is concerned with the business of shipping, to which the making of contracts is but an incident." See also Judge Washington's concurring opinion (R. 246), pointing out that the dual-rate system "in actual practice * * * is being used to penalize a shipper because he has patronized another carrier, or at least reserved the right to do so."

Furthermore, Section 14, Third, prohibits retaliation not only because the shipper has patronized another carrier but "for any other reason." The statute is thus broad enough to cover retaliation, not only for actually patronizing other carriers, but also for refusal to sign an agreement not to do so.

Indeed, the Board's construction of the Act would open the way to serious evasion. For example, Section 14, Third, also prohibits a carrier from refusing available space because a shipper has patronized other

carriers. The Board's construction, however, would authorize Conference lines to deny space to shippers who refuse to sign exclusive patronage contracts, since such denial would not be for patronizing other carriers but for refusing to agree not to do so. In view of the indisputable Congressional purpose to prohibit conferences from using their concerted economic power to obtain unfair competitive advantages over independent carriers (see *infra*, pp. 41–49), we submit that Section 14, Third, should not be interpreted so as to permit the Conference to do indirectly what it cannot do directly. The Act should be construed so as to effectuate, not to frustrate, its basic purpose. *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 542.[10]

2. *The higher rate is unlawfully discriminatory*

Section 14, Third, prohibits a carrier from retaliating against a shipper by refusing available space or

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[10] The Conference contends (Br. No. 74, pp. 42–46) that the court below, in holding that the dual-rate system is retaliatory, ignored the Board's findings to the contrary. But the Board's conclusion rested on its erroneous view (see *supra*) that the system is not retaliatory because the higher non-contract rate is not "charged as a retaliation for 'patronizing any other carrier' * * * [but] because the shipper does not sign the contract, regardless of whether or not he patronizes any other carrier."

The Board's own findings refute the Conference's argument (Br. No. 74, p. 46) that the higher non-contract rate is not "coercive or penal." The Board found that the higher rate does not reflect any "difference in the cost or value of service rendered" (R. 35) to the non-signing shipper. And the admitted purpose of the system is to force shippers into giving all their business to the Conference, thereby aiding the Conference in obtaining a monopoly of the trade. See *infra*, p. 46.

resorting to "other discriminating or unfair methods." The Board recognized (R. 59, 67), as this Court repeatedly has pointed out,[11] that the charging of two different rates for the same transportation service is "prima facie discrimination". However, it construed the unqualified prohibition against discrimination in Section 14, Third, as condemning only "unjust" discrimination, and concluded that the admittedly discriminatory dual-rate system here involved was not "unjustly" so.

The legislative history of the Act indicates, however, that the unqualified prohibition against discrimination was deliberate, not inadvertent, and that Congress in Section 14, Third, intended to prohibit *any* discrimination, not merely "unjust" discrimination. The report of the Alexander Committee (hereinafter cited as "Alex. Rep."), which is the principal source of the legislative history of the Act,[12] reflects the strong

[11] See *Western Union Tel. Co.* v. *Call Publishing Co.*, 181 U. S. 92, 100; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 583; *Alabama Great Southern R. Co.* v. *United States*, 340 U. S. 216, 227; cf. *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303.

[12] The Alexander Report was prepared by the House Committee on the Merchant Marine and Fisheries pursuant to resolutions in the 62d Congress (H. Res. 425, 587) and the 63d Congress (H. Res. 205), and was submitted during the 63d Congress in 1914 (H. Doc. 805, 63d Cong., 2d Sess.). It was on extensive hearings and documentary evidence submitted to the Committee. A bill largely carrying out the recommendations of the Report was introduced (H. R. 17328), but not passed. In the 64th Congress, the bill was reintroduced in substantially

demand of shippers that such an aboslute ban be imposed. Thus, in summarizing the recommendations which it had received, the Committee stated (p. 313, emphasis added): "Briefly stated, it was the consensus of opinion that *discrimination between shippers in the matter of rates* and cargo space *should be absolutely prohibited* * * *." And the Committee recommended "that, with due regard to the proper loading of the vessel and the tonnage available, discrimination between shippers * * * in the matter of rates * * * be prohibited" (p. 421).

That the drafters of the Act did not intend "discriminating" in Section 14, Third, to be construed as "unjustly" (or "unreasonably") discriminating, is indicated by their use of the two phrases "discriminating or unfair" and "unjustly discriminatory or unfair" in two bills introduced in Congress by Chairman Alexander (H. R. 17328, 63d Cong., 2d Sess.; H. R. 15455, 64th Cong., 1st Sess.). Section 2, Third, of the first bill (which corresponds with Section 14, Third, of the Act) contained the phrase "discriminating or unfair" as Section 14, Third, of the Act does today. Section 3 of that bill (which generally corresponds with Section 15 of the Act) similarly specified that the Interstate Commerce Commission was empowered to disapprove agreements which it found

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the same form (H. R. 15455, 64th Cong., 1st Sess.). The report of the Committee recommending the bill quoted verbatim the recommendations of the Alexander Report, and stated that the bill had been framed in large part upon the basis of its recommendations. H. Rep. 659, 64th Cong., 1st Sess., p. 27. The Senate Committee also adopted the recommendations of the Alexander Report. S. Rep. 689, 64th Cong., 1st Sess.

to be "discriminating or unfair" as between shippers. Later, however, when Chairman Alexander introduced H. R. 15455 (the bill which became the Shipping Act), the phrase "discriminating or unfair" in Section 3 of H. R. 17328 had been changed in H. R. 15455 to "unjustly discriminatory or unfair." But the phrase "discriminating or unfair" in Section 2, Third, of H. R. 17328, was unchanged in H. R. 15455. In short, Congress added the qualifying adjective "unjustly" in one section of the Act but did not do so in the section now under consideration. From this, it can only be concluded that, had the Alexander Committee wished to limit Section 14, Third, to "unjustly" discriminatory practices, it would have done so explicitly at the same time.

The fact that qualifying adjectives are found in provisions relating to general discrimination between carriers, shippers, ports, etc. (see Sections 15–17, *infra*, pp. 63–65) is nowise inconsistent. Congress may well have recognized that some differences which would be called discrimination would inevitably occur in the rate structures and services rendered, and deliberately have left some leeway for such differences, if found by the Board not to be unjust or unreasonable. But when Congress dealt with retaliation in Section 14, Third, it was less indulgent. Even a little retaliation, achieved by a discriminating or unfair method, is a dangerous and undesirable practice. Congress presumably felt the same way about retaliation as it did about deferred rebates and fighting ships, which it also forbade without qualification. A similar deliberate differentiation between any discrimination

and "undue or unreasonable" discrimination is found in the Interstate Commerce Act. See opinion of Judge Learned Hand in *Baltimore & Ohio R. Co.* v. *United States*, 22 F. Supp. 533, 538 (N. D. N. Y.).

But even assuming *arguendo*, as the Board contends (Br. No. 73, pp. 59–62), that Section 14, Third, prohibits only "unjust" discriminations, such a construction would not legalize the dual-rate system. For if there were some difference, albeit a slight one, between the services offered the contract and non-contract shipper, there might well be a question whether the admittedly discriminatory rate differential was "unjust." Concededly, a rate differential may be justified under a statute prohibiting unjust discrimination or undue preference if it has some "reasonable relation to the amount of difference" in services provided. *Western Union Tel. Co.* v. *Call Publishing Co.*, 181 U. S. 92, 100. But here there is not even a pretense of a difference in service. Accordingly, by any standard known to transportation law, the differential must be regarded as wholly arbitrary and therefore "unjustly" discriminatory.

Indeed, it is difficult to suggest a clearer case of "unjust" discrimination than that of two shippers paying different rates for the same cargo, moving side by side in the same vessel between the same ports, solely because one has agreed and the other has refused to boycott the carrier's competitors. And such discrimination does not become "just" merely because it is an effective device for carrying out what the Board deems to be the laudable purpose of promoting "stability" in the trade by weakening Isbrandtsen's

competitive position.[13] Although the Board generally has broad discretion to determine whether a particular discrimination is "unjust" (see *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304), it cannot ignore settled principles of transportation law in making that determination.[14]

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[13] Significantly, it was the Conference itself, and not Isbrandtsen, which created "instability" by instituting the rate war. As the Board found (R. 29), rates in the trade were stable prior to the rate war.

[14] The above showing that the dual-rate system is unjustly discriminatory also compels, we believe, its invalidation under Section 17 of the Shipping Act. That section prohibits any water carrier from collecting any rate which, *inter alia*, is unjustly discriminatory between shippers. This prohibition parallels the prohibition on "unjust discrimination" in Section 2 of the Interstate Commerce Act (24 Stat. 379, as amended, 49 U. S. C. 2), which is defined as the charging of different rates for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." This Court has pointed out that "the settled construction in respect of the [Interstate Commerce] act must be applied to the [Shipping Act, 1916] * * *." *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 481. There can be no question that, under Section 2 of the Interstate Commerce Act, no railroad in the country—let alone a group of railroads acting in concert—would be permitted to charge one shipper 9½% more than another for the same service solely because the latter refused to give the carrier all his business. See cases cited *supra*, p. 25, note 11.

Under this analysis, the Board is precluded from approving the dual-rate system both because it violates Section 17 and because of the requirement in Section 15 for disapproval of any agreement which is found to be "unjustly discriminatory * * * as between * * * shippers * * *."

The dual-rate system similarly runs afoul of Section 16 of the Shipping Act. Both that section and Section 3 (1) of the Interstate Commerce Act prohibit common carriers from giv-

### 3. *Section 14, Third, applies to rates as well as services*

Petitioners contend (Br., No. 73, pp. 23–24, 55–59; Br. No. 74, pp. 33–40, 78–80, 85–86, 90), however, that Section 14, Third, prohibits retaliatory discrimination only with respect to services, and not with respect to rates. They argue (1) that the legislative history shows that the Alexander Committee used the word "retaliation" primarily in connection with denial of space or similar discriminations in service; and (2) that, since the first clause of Section 14, Third, prohibits refusal of space, the reference to "other" discriminating methods in the subsequent clause of that section must, under the rule of *ejusdem generis*, be limited to other service discriminations.

But the fact that the Alexander Committee used the word "retaliation" in speaking of services affords no basis for inferring that Congress intended to limit the broad language of Section 14, Third, only to services. It shows only that refusal of space was one of the principal retaliatory measures which conferences employed against shippers who patronized the independents. The Congressional purpose to prohibit conferences from using their concerted economic power to drive independent ship owners out of the

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ing any "undue or unreasonable preference or advantage to any particular person * * *" or subjecting any person "to any undue or unreasonable prejudice or disadvantage *in any respect whatsoever*" (emphasis added). Plainly, it would constitute undue or unreasonable preference or prejudice for a railroad to give a shipper a substantially lower rate solely because of his exclusive patronage; it is similarly preferential and prejudicial for an ocean carrier to do so.

trade (see *infra*, pp. 41–49) is completely inconsistent with the view that Congress sanctioned retaliation with respect to rate matters.

Nor does the fact that the phrase "other discriminating or unfair methods" follows the single clause prohibiting retaliation in space accommodations afford any basis for limiting the other methods condemned to those relating to service. Even assuming that the rule of *ejusem generis* is applicable here, it would appear that the phrase "other discriminating or unfair methods" was meant to bar similar types of retaliation (such as retaliation by rate discrimination) and not only retaliation with respect to services. Particularly is this so in view of this Court's admonition that "The rule of *ejusdem generis* * * * may not be used to defeat the obvious purpose of legislation." *Gooch* v. *United States*, 297 U. S. 124, 128; *United States* v. *Alpers*, 338 U. S. 680, 682. Here the "obvious purpose" of this legislation was to prevent the Conference from using its concerted economic power to drive independent carriers out of the trade.[15] See *infra*, pp. 41–49.

Equally without merit is petitioners' contention (Br. No. 73, pp. 22–23, 42, 55; Br. 74, p. 40) that

[15] Similarly without any basis is the Conference argument (Br. No. 74, pp. 37–38) that the ban on "other discriminating or unfair methods" in Section 14, Third, relates only to the practices covered by subsections (b) and (c) in Section 14, Fourth—namely, the loading and landing of freight in proper condition, and the adjustment and settlement of claims. There is nothing in either the language of the Act or its legislative history to show that Congress intended thus to limit the broad language in Section 14, Third.

under our construction Section 14, Third, would also outlaw deferred rebates, and that Section 14, First, would therefore be redundant. Congress quite plainly was not referring to deferred rebates and fighting ships in Section 14, Third, when it spoke of resorting to "*other* discriminating or unfair methods;" for earlier provisions of the statute had already outlawed those practices. In other words, Congress specifically prohibited deferred rebates and fighting ships, the most widespread and generally criticized methods employed by the conferences at that time, and then went on to condemn all "*other* discriminating or unfair methods" (emphasis added) which might be used to coerce shippers into boycotting independent carriers.

In sum, Section 14, Third, prohibits any discrimination by carriers against shippers based on their refusal to deal exclusively with such carriers. This result follows whether (a) the "retaliate" and "resort to" clauses are read as co-equal prohibitions or (b) the "space accommodations" and "resort to" clauses are read as alternative ways to "retaliate". Under the latter construction, adopted by the court below (R. 242–243),[16] the dual-rate system plainly constitutes retaliatory discrimination against a shipper "because such shipper has patronized any other carrier * * * or for any other reason." Under the other interpretation, it is equally clear that a carrier

[16] This construction, it should be noted, parallels Recommendation No. 6 of the Alexander Committee (see *infra*, pp. 35, 36). Apparently neither petitioner challenges this construction of the provision.

which charges a shipper a substantially higher rate because the latter has refused to boycott competing independent carriers thereby "resort[s]" to other discriminating or unfair methods, because such shipper has patronized any other carrier * * * or for any other reason." Irrespective of which construction is adopted, the gist of the violation is the imposition of sanctions against shippers for their refusal to give exclusive patronage to conference carriers.

B. THE DUAL-RATE SYSTEM IS ALSO AN "UNFAIR METHOD" UNDER SECTION 14, THIRD

The conference dual-rate system is also unlawful under Section 14, Third, in that it constitutes an "unfair method" used against independent shippers. Concededly, the term "unfair" is a general one with many meanings in different contexts. But here, for the reasons set forth above, Congress quite plainly had in mind the abuse of the combined economic power of the conferences being used to squeeze independents and shippers. If it is unfair (and Congress undoubtedly thought that it is) to refuse available space to a shipper because he has patronized another carrier, it is equally unfair to offer the space but only at a penalty rate. Similarly, if deferred rebates and fighting ships are unfair, it can hardly be regarded as fair to impose substantial penalties in the form of increased rates in order to coerce shippers to abandon their economic freedom to patronize carriers of their choice.

In *Prince Line* v. *American Paper Exports*, 55 F. 2d 1053, 1055 (C. A. 2), a proceeding concerning Section 16 of the Act, the court, through Judge Learned

Hand, defined an "unfair device" as one which "destroyed that equality of treatment between shippers, which it was the primary purpose of the section, and for that matter of the whole statute, to maintain."

And in *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41, 45–46, the Shipping Board described the dual-rate contracts involved there as being of the same nature as "other kinds of unjust discrimination resulting from *unfair conditions imposed by carriers upon shippers*" (emphasis added). The Board there also rejected the contention that shippers were not denied "substantial equality of treatment" because they were "extended full opportunity to avail themselves of the lower rates by agreeing to the same conditions which contract shippers had accepted." It ruled (*ibid.*):

> Under the statute, the complainants, as members of the shipping public, were entitled to have their shipments carried at the same rates as other patrons who received identical service. This right attached to each individual transportation transaction as such, and was not to be predicated upon any condition imposed by the respondent restricting the complainants' freedom of choice as to what carrier or carriers they should elect to patronize in connection with subsequent shipments.

To the same effect is *Contract Routing Restrictions*, 2 U. S. M. C. 220, 226, in which the Board condemned a dual-rate system, stating that "Equality of treatment is not accorded the shipper merely by giving him the opportunity to enter into discriminatory contracts in the same manner as offered to all shippers."

C. THE LEGISLATIVE HISTORY OF THE ACT DOES NOT REFLECT ANY IMPLIED CONGRESSIONAL APPROVAL OF THE DUAL-RATE SYSTEM, BUT SHOWS RATHER A PURPOSE TO OUTLAW ALL DISCRIMINATORY PRACTICES USED BY CONFERENCES TO PENALIZE THE PATRONAGE OF INDEPENDENT CARRIERS

The basic question before the Alexander Committee was whether to recommend abolition of the conference system. Extensive arguments were presented in favor of and against the system (Alex. Rep., pp. 295–307), and the Committee concluded (*id.*, p. 415) that "only two courses of action" were possible:

> Either the agreements and understandings, now so universally used, may be prohibited with a view to attempting the restoration of unrestricted competition, or the same may be recognized along lines which would eliminate existing disadvantages and abuses. [*Id.*, pp. 415–416]

The Committee recommended the second course—continuation of the conference system but "under some form of effective government supervision" (*id.*, p. 417) "which would eliminate existing disadvantages and abuses" (*id.*, pp. 415–416). The Committee made seven detailed recommendations with respect to such regulation. Among the proposals was that "rebating of freight rates to shippers be made illegal," and that, "with due regard to the proper loading of the vessel and the tonnage available, discrimination between shippers, or ports, in the matter of rates and space accommodations be prohibited" (*id.*, p. 421).

Recommendation No. 6 was (*ibid.*)

> That the use of "fighting ships" and deferred rebates be prohibited in both the export and import trade of the United States. Moreover, all carriers should be prohibited from retali-

> ating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason.

This recommendation parallels the provisions, and was the source, of Section 14, First through Third.

In order to determine what the Committee had in mind when it recommended a prohibition against "resorting to other unfair methods of discrimination," it is necessary to examine the anticompetitive practices which the Committee found had been used by conferences for "meeting the competition of non-conference lines" (*id.*, p. 415; see also, p. 417). In its summary of "methods of control exercised in connection with steamship conferences and agreements in American foreign trade" (*id.*, p. 281), the Committee stated that conferences had "adopted" "[t]hree methods" "to defend their mutual interests in the event of competition from other lines" (*id.*, p. 287). These methods were listed as:

> (1) The deferred rebate, which "has proved by far the most effective device for the control of a trade * * *." (*ibid.*).
>
> (2) "*The use of fighting ships, or collective competition against a single competing line*" (*id.*, p. 289, italics in original).
>
> (3) "*Contracts with shippers which may be classified as:* (a) *Joint contracts made by the conference as a whole* * * *"; (b) "*Contracts made by the individual members of the conference* * * *"; and (c) "*Contracts with large*

*shippers either for all their freight or for certain important articles forming the main basis in a given trade, at lower rates than those charged on similar goods, if shipped in small quantities*" (*id.*, pp. 290–291; italics in original).

Petitioners argue (Br. No. 73, pp. 35–42; No. 74, pp. 79–84, 86–91) that the "joint contracts made by the conference as a whole" referred to in 3 (a), *supra*, were substantially the same as the dual-rate contracts here involved; and that the failure of Congress specifically to outlaw such joint contracts, while prohibiting deferred rebates and fighting ships, manifests an intent to sanction the former. But such "joint contracts" were not comparable to the dual-rate system; and the fact that the Alexander Committee recommended outright prohibition of deferred rebates and fighting ships, and did not propose a specific ban on "joint contracts made by the conference as a whole," does not establish that the Committee thereby intended to give the dual-rate system its blessing.

1. *The contracts before the Alexander Committee are not comparable to the present dual-rate system*

Contrary to petitioners' contention (Br. No. 73, pp. 42–50; No. 74, pp. 81–83), the contract "system" which was before the Alexander Committee is not comparable to the dual-rate system as it now exists. At the outset, the evidence before the Committee showed that the "joint contracts made by the conference as a whole" were the exception and not the rule; the usual contract was between a shipper and an individual line. Thus, petitioners place great reliance on certain con-

tracts submitted to the Committee by Mr. Gerhard general agent of the Prince Line. But only 3 of the 43 contracts submitted were joint contracts made for the conference; the remaining 40 were made by individual lines. Proceedings of the Committee on the Merchant Marine and Fisheries in the Investigation of Shipping Combinations under House Resolution 587 (62d Congress) (hereinafter cited as "Hearings"), pp. 246-263. Mr. Gerhard testified (Hearings p. 263) that the contracts were jointly assumed by other members of the conference only "[w]here it comes to large bulk and one line does not care to assume the responsibility of the whole contract * * *."

Surely the submission of three such contracts (out of 43) provides no basis for any inference of their approval by the Alexander Committee—let alone the present dual-rate system; even less justified would be any inference of approval by the Congress as a whole. And, with respect to the 40 contracts made with some individual carriers, the economic impact of such contracts is quite different from the economic impact of a dual-rate system used jointly by members of an entire conference. In the former situation, there is relatively little coercion on the shipper to give his exclusive patronage to a single carrier; if he does not do so, the shipper is free to turn to other carriers—conference or nonconference—which are willing to carry the goods at the regular rate without requiring a commitment of exclusive patronage. On the other hand, where the entire conference joins together in requiring such a commitment from the

shipper, independent carriers (already or potentially in the trade) are effectively frozen out; for, as we show (*infra*, p. 43), shippers who require a regular service (as most do) necessarily must use conference carriers and will in most instances find it financially essential to agree to boycott independent carriers.

Furthermore, there was no uniformity in the contracts before the Alexander Committee as to either the differential between the contract and non-contract rate or the way in which the differential was determined. In some instances, the contract rate was fixed as a result of negotiations between a shipper and an individual line, and was given because the shipper was a large customer rather than because he agreed to ship exclusively via the particular carrier (Hearings, pp. 634–636, 706). Many (if not most) of the contracts did not provide for fixed percentages below the tariff rate, but merely for stated rates (*id.*, p. 213–214, 615–617, 653–654). While the rate thus fixed often would be below the regular tariff, particularly if a large shipper were involved, nevertheless at some time during the period of the contract it might be considerably above or below the tariff.[17] Thus, the signatory to an exclusive patronage contract was not necessarily guaranteed a lower rate than a non-signatory, but only that his rate would be the same for the term of the contract—an important consideration to shippers

[17] The general freight agent of one steamship line testified that "A man who makes a contract with us for a year might, in some cases, be paying more freight if competitive conditions had forced our rates down at different times * * * He has done it in several cases." Hearings, p. 654.

in meeting competitors' quotations for future delivery (Hearings, 213, 460–461, 615–617).

Unlike deferred rebates and fighting ships, therefore, exclusive dealing contracts primarily were not used against non-conference line competition (although they sometimes served that purpose), but rather to enable particular carriers to secure desirable business.

A further significant distinction is that many of the contracts before the Committee were for fixed periods, usually six months or a year (Hearings, pp. 288, 632–634), while the present contracts are of indefinite duration.

In short, the most that the evidence before the Alexander Committee shows is that there were a few contracts which in some respects were similar to the dual-rate agreements here involved. But the dual-rate *system*, as it now exists, involving the concerted use by a conference of its economic power to coerce shippers into boycotting the independents, was not then in use. Indeed, since the deferred rebate system had "proved by far the most effective device for the control of a trade * * *" (Alex. Rep. 287), conferences would have little need to use the less effective dual-rate system until the deferred rebate had been prohibited by the Shipping Act, 1916.[18] It is hardly surprising,

[18] "* * * it is not definitely known when they [dual-rate agreements] became widely prevalent in American trades, but it is generally thought that they came into fairly general use during the 1920's, after the war-created shortage of shipping turned into a plethora of tonnage." Marx, *International Shipping Cartels* (1953), p. 210.

therefore, that Congress did not single out the dual-rate system for specific condemnation.[19]

Furthermore, unlike the deferred rebate and the fighting ship, which Congress could, and did, define with precision, the exclusive dealing arrangements were of such a wide variety and form that it would have been extremely difficult, if not impossible, for Congress to have specified the particular ones to be outlawed. Also, such attempted specification might have been dangerous, since it could have opened the door to evasion through variations in the form of the transaction. The more logical way to deal with the problem and the one which, we believe, Congress adopted, was to employ a general provision which was broad enough to cover all "other discriminating or unfair methods."

2. *The present dual-rate system is indistinguishable in substance from the deferred rebate system condemned by Congress*

Nor is there any basis for the Board's contention (Br. No. 73, pp. 39–40) that the principal feature of the deferred rebate system which the Committee condemned was that the shipper was kept in continual dependence upon the conference—an evil allegedly not present in the dual-rate system. True, the Committee did state, in a summary of *contentions* as to the disad-

[19] Another reason may have been that the methods used by conferences "to meet the competition of nonconference lines" about which shippers filed complaints with the Alexander Committee were "fighting ships, deferred rebates, and threats to refuse shipping accommodations * * *." Alex. Rep., p. 417.

vantages of shipping conferences and agreements a
then conducted, that (p. 307):

> By deferring the payment of the rebate unti
> three or six months following the period t
> which the rebate applies ship owners effectivel
> tie the merchants to a group of lines for succes
> sive periods. In this connection *it is argue*
> that the *ordinary contract system* does no
> place the shipper in the position of continua
> dependence that results from the deferred re
> bate system. [Emphasis added.]

But the quoted passage is not a statement of approva
but merely a statement of an argument made befor
the Committee which, contrary to the Conference'
contention (Br. No. 74, pp. 62–64), the Committe
neither expressly approved nor disapproved.[20]

The basic vice of the deferred rebate, moreover
was not that it kept the shipper in a position of con
tinued dependence upon the conference, but that th
shipper "*is prevented from patronizing any othe
service* since that act would mean the forfeiture of al
accumulated rebates" (Alex. Rep. 287, emphasi
added). In other words, the deferred rebate, by re

[20] The footnote dictum in *Swayne & Hoyt, Ltd.* v. *Unite
States*, 300 U. S. 297, 307, fn. 3, relied upon by petitioners (Br
No. 73, pp. 40, 64–66; No. 74, pp. 60–66; see R. 50–51), tha
"The Committee recognized that the exclusive contract syste
does not necessarily tie up the shipper as completely as 'de
ferred rebates,' since it does not place him in 'continual depend
ence' on the carrier * * * [and] the Committee did not con
demn the contract system completely," appears to be based o
a misreading of the Committee's position, as Judge Washingto
pointed out below (R. 246).

quiring a shipper to pay more for the same service if he patronized an independent carrier, made it economically difficult, if not impossible, for him to do so, and thereby effectively kept the independents out of the trade. The concerted use of this device by a conference was particularly effective as an anticompetitive device because (Alex. Rep. 288),

> * * * as has been repeatedly pointed out in this volume, shippers require, above all else, a regular service, and in this connection the testimony shows that by patronizing an outside line the shipper would not only forfeit his rebates but could be penalized by being denied accommodadations for future shipments even at the full rates of freight. Such retaliation would leave the shipper unprotected since an independent line is not large enough to supply him with tonnage at all times. In other words, the conference lines, by rotating the sailings of their steamers, can give a regular and frequent service, whereas the independent line with its fewer steamers can only offer sailings at less frequent intervals.

The actual coercive effect of the conference dual-rate system upon shippers and independent carriers is substantially the same as the deferred rebate system. Each subjects a shipper who wishes to patronize independent carriers to heavy penalties in the way of substantially higher rates, and each imposes serious competitive obstacles in the way of the independent carrier. Just as a shipper under the deferred rebate system loses a rebate if it subsequently patronizes an independent, so a signatory to the exclusive patronage

agreements under the dual-rate system is forced to pay a substantial penalty by way of liquidated damages if he chooses to deal with a conference competitor.[21]

A hypothetical case will, perhaps, serve best to illustrate the close similarity between the deferred rebate system and the dual-rate system. Under the deferred rebate system, which was in common use when the Alexander report was written, Shippers A and B would pay identical sums, let us say $100, for identical shipments over a conference line. Shippers were invited, however, to sign exclusive patronage contracts. These contracts provided, in substance, that the shipper would receive a rebate, let us say of 10%, some time after the expiration of the contract, if he had patronized conference lines exclusively during the contract period. Thus, if Shipper A signed and observed such a contract, his actual rate would ultimately prove to be $90, *i. e.*, $100 less the $10 deferred rebate. To Shipper B, a non-signer, the rate would remain $100.

Under the dual-rate system, the same end result is reached by a slightly different road. A shipper who signs the exclusive contract thereby receives the reduced rate in advance and is made subject to penalty provisions (see R. 36) if he thereafter fails to observe the exclusivity requirement. And a shipper who fails to sign is compelled to pay a higher rate, the amount

[21] The Conference's argument (Br. No. 74, pp. 46–49) that the liquidated damages clause is valid is beside the point. The significant thing about this provision is that it coerces a contract shipper not to patronize independent carriers.

of the differential depending upon the particular percentage fixed.

In either event, it is obvious that the shipper who refuses to sign the exclusive contract is penalized. It is immaterial whether this is accomplished by giving the contract shipper a premium in advance—a prepaid rebate, as it were—or by paying him a deferred rebate.

*3. Congress sought to protect shippers from coercive conference practices with respect to the granting of exclusive patronage.*

We think it would have been anomalous for Congress to have prohibited deferred rebates and at the same time to have sanctioned other devices which have an equally coercive effect upon shippers. A more logical reading of Section 14, and one which effectuates the basic Congressional purpose of protecting the independent carriers from the predatory practices of the conferences, is that Congress specified the principal unfair practices then employed and then went on to condemn "all other discriminating or unfair methods" which might be used to coerce shippers into granting their exclusive patronage to conference carriers.

The fact that Congress selected a "regulated conference system in preference to unregulated cutthroat competition" (R. 59) and empowered conferences, subject to Board approval, to destroy competition among their members by fixing rates, does not mean that conferences also were authorized to use their collective economic power against independent carriers. It is one thing for a group of competitors to

eliminate competition among themselves; it is quite another for them to attempt concertedly to eliminate another competitor.

As the Board has "candidly" recognized,[22]

> The contract system should be frankly recognized as a device tending towards the monopolization of ocean commerce in particular trades by the members, collectively, of conferences which serve those trades. We use the word "monopolization" with no ideological overtones, but merely in its dictionary sense, which is the obtaining or assumption of "exclusive possession or control." Whether the contract system in a particular case actually has the effect of producing a complete monopoly (*i. e.*, control of a trade) depends upon how well it works; admittedly, it is monopolistic in purpose. The extent to which it is monopolistic in effect depends upon how successfully that purpose is achieved * * * if a contract system is wholly effective, it will result in a complete monopoly in the sense that all cargo moving in a trade where the system is used, will move in ships of conference carriers. Necessarily, in these circumstances, there would be no service by independent operators.[23]

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[22] The Board's statements were made in its brief filed in *Isbrandtsen Co. v. United States*, 96 F. Supp. 883, and quoted in the court's opinion at page 888, footnote 13.

[23] See also *In the Matter of the Statement of Transpacific Freight Conference of Japan, No. 743* (December 19, 1955), where the Board, in disapproving a conference agreement to institute a dual-rate system, stated (mimeographed opinion, p. 26, emphasis added) that the "possibility" that a conference would "have a monopoly of the trade" is not "in itself objectionable," but that "a monopoly which would be created as a result of the in-

It is hardly likely that Congress, after carefully prohibiting the principal devices (fighting ships and deferred rebates) which the conferences had used in attempting to monopolize the trade, would have sanctioned a similar device which, if "wholly effective * * * will [also] result in a complete monopoly" of the trade.[24] And it is no answer that the Board has estimated that in this particular trade the dual-rate system will "probably" permit Isbrandtsen to hold 10% of the business. The legality of such a device

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stitution of a dual rate system is not permissible unless the potential disadvantages of that monopoly and the prima facie discrimination against shippers inherent in the use of dual rates are outweighed by the need for such a system and the benefits to shippers and the trade to be derived from the system. * * * *To hold that a dual rate system may never be instituted where its use would result in monopoly would defeat the congressional purpose in passing the act and in exempting agreements among carriers from the operation of the antitrust laws.*" Chairman Morse, dissenting, expressed a similar view (*id.*, p. 33): "we must at the outset recognize the immediate purpose of the [dual rate] system, simply stated, to be the elimination of nonconference competition, as such, as a significant force in that trade * * *."

[24] The Board argues (Br. No. 73, p. 54) that, since there was submitted to the Alexander Committee a statement by conference line representatives (Hearings, pp. 1357–1374; see also pp. 369–381) to the effect that if deferred rebates were outlawed they would be succeeded by a contract rate system, the Committee "must have anticipated that a contract rate system would replace the deferred rebate system"; and that the Committee's failure to condemn the contract rate system thereby impliedly constituted approval. But this statement was presented by a conference line representative in support of the argument that the deferred rebate should not be prohibited. The statement provides no basis for inferring that Congress impliedly sanctioned what the steamship representatives threatened might come to pass.

does not depend on how completely it achieves monopoly, for it is equally illegal whether it produces a 90%, a 95%, a 99%, or a 100% monopoly.

The conclusion that Congress did not intend to sanction practices with such monopolistic tendencies is strengthened by the fact that, as the Board recognized (R. 57), Congress did not give it the rate-fixing power which customarily is provided in a system of public utility regulation which contemplates or tends toward monopoly. Without effective competition by independent carriers, conferences would have little incentive to keep rates at a reasonable level. Cf. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 427 (C. A. 2), pointing out that "possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone." [25]

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[25] The Board argues (Br. No. 73, p. 30) that outlawing the conference dual-rate system would injure American-flag carriers. The argument is that, once the conference members are "seriously hurt by the independent's rate-cutting, the conference is strongly impelled to abandon its [uniform] rate structure and * * * to permit each of the members to fix its own rates independently. All lines, including the independent, are then placed in a position of unrestrained competition, and low operating costs become the main index of ability to survive. In a situation of this sort, American-flag lines are by far the most vulnerable, for ship operating and construction costs under United States registry are, and historically have been, materially higher than under any other."

This argument, however, ignores the fact that, under Title VI

That Congress intended Section 14 to outlaw *all* discriminatory practices which the conferences might use as economic barriers against the independents, and not just the practices specifically enumerated, is further shown by the following statement by Representative James F. Byrnes, a member of the Alexander Committee, made on the floor of Congress with respect to Section 14 (53 Cong. Rec. 8087): "The regulatory features of the bill are agreed to by all fair-minded men. They seek simply to enable an independent shipowner to carry on his business without having the shipping trust drive him out by discriminatory and unfair practices." [26]

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sidies are paid to American-flag carriers on the basis of "the amount by which the cost of operating the vessel under United States registry exceeds the estimated cost of operating the same vessel under competitive foreign registry." Sen. Rep. 2494, 81st Cong., 2d Sess. (1950), p. 43. The subsidy is designed to eliminate or minimize the adverse competitive position of American-flag carriers due to the lower operating costs of their foreign competitors.

[26] There is no merit to the Conference's argument (Br. No. 74, pp. 91–93) that the subsequent history of Congressional study and regulation of American foreign trade indicates that Congress implicitly sanctioned the Board's approval of the conference dual-rate system. Although it relies on a statement in a 1950 Senate Committee Report which approved the conference system, it fails to point out that the Committee explicitly refused to take a position with respect to the validity of the dual-rate system. Thus, in the paragraph immediately preceding the language which the Conference quotes, the Committee stated (Sen. Rep. 2494, 81st Cong., 2d Sess., pp. 84–85, emphasis added):

"The Maritime Commission and its predecessors charged with enforcing the law have recognized the contract rate system as legal. However, the system has recently been attacked by one of the shipping lines as illegal and oppressive. The Depart-

The Board's argument (Br. No. 73, pp. 25–33; R. 59–60) that the penalty rate system should be approved because it is essential to the successful functioning of the conference system cannot prevail. First, there is no indication that Congress considered the penalty rate system or any other measure for coercing exclusive patronage of conferences a permissible method of competition. The Act and the legislative history reflect the opposite view. But even if the penalty rate system were the *sine qua non* of conference survival, the Board would be powerless to abrogate express prohibitions of the Shipping Act to make use of the system possible. Second, the Board's own findings refute its conclusion that conference members need to rest upon the crutch of discriminatory rates in order to survive. Prior to the Conference's institution of the rate war in March 1953, the Conference, at a time when Isbrandtsen was vigorously competing in the trade, had been able to obtain and hold between two-thirds and three-quarters of the traffic in this trade (see *supra*, p. 5). Moreover, the continued existence of many conferences which do not use the dual-rate system, or which do not apply it to commodities generally, attest the fact that the penalty rate system is not indispensable.

D. THE DECISIONS OF THE BOARD ARE OF LITTLE WEIGHT HERE

Petitioners argue (Br. No. 73, pp. 69–73; No. 74, pp. 67–74) that the Board consistently has held that

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ments of Agriculture and Justice have joined the attack. *Pending a decision by the courts as to the legality of the practice, the subcommittee does not believe it advisable to comment definitely upon this phase of the matter.*"

the dual-rate system is not illegal *per se,* and that this interpretation of the statute by the agency charged with enforcing it "is entitled to weight" (*ibid.*). But, as the late Judge Frank declared, the Board decisions "have lacked uniformity and consistency; and in such circumstances, administrative interpretations have little weight" (citing numerous cases).[27]

That the Board has far departed from its earlier interpretation of the Act is shown by its 1922 decision in *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.,* 1 U. S. S. B. 41, holding unlawful as "unjustly discriminatory" (under Sections 16 and 17 of the Act) a dual-rate formula used by a single carrier. The Board stated (p. 45):

> * * * It is evident that *the purpose of Congress in enacting these provisions of the statute was to impose upon common carriers within the purview thereof the duty of charging uniform rates to all shippers receiving a similar transportation service.* The duty of the respondent under these sections was to serve the public impartially, and we think the language used in Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, in dealing with a similar statute, is entirely applicable to the case in hand. The court there said: "All individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. * * * *But that principle of equality*

[27] *Isbrandtsen Co.* v. *United States,* 96 F. Supp. 883, 890–891 (S. D. N. Y.), affirmed by equally divided Court *sub nom. Mowinckels Rederi* v. *Isbrandtsen Co.,* 342 U. S. 950.

> *does forbid any difference in charge which is not based upon difference in service*, and, even when based upon difference of service must have some reasonable relation to the amount of difference, and can not be so great as to produce an unjust discrimination." From the facts of record in the case before us it is manifest that the transportation service furnished the complainants and contract shippers was in all respects identical. [Emphasis added.]

As we have already pointed out (*supra*, pp. 43–45), the coercive effect of a dual-rate formula used by a single carrier is relatively negligible in comparison with the impact of a system used jointly by the members of an entire conference. Under the *Eden* decision, therefore, it would seem to follow *a fortiori* that such a system would constitute unlawful discrimination.[28]

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[28] Petitioners, however, rely on the following excerpt from the Board's opinion in *Eden* (p. 46) as upholding the legality of a dual-rate system under Section 14, Third:

"No evidence was adduced relating to any action of the respondent tending to show direct or indirect retaliation against the complainants for patronizing other carriers. Likewise, from the facts of record it is clear that the contracts for exclusive patronage complained of were not to any extent based upon volume of freight offered. That part of the complaint alleging violations by the carrier of paragraphs 3 and 4 of section 14 of the act is, therefore, without support."

This contention of petitioners is without merit on several grounds.

First, on its face, the excerpt merely relates to the failure of the complaint to adduce evidence of retaliation; the excerpt does not indicate what the disposition would be if such evidence were adduced. As pointed out above (*supra*, pp. 22–24), there is ample evidence that the system in the instant case is retaliatory in nature.

Second, only a single carrier's dual-rate formula—not an entire conference's system—was involved in *Eden*.

Third, the excerpt is, in substance, only a dictum since the

It is of course hornbook law, especially in the field of antitrust, that many practices which are legal when done individually are nevertheless illegal when done concertedly with others. See, *e. g., Times-Picayune Co.* v. *United States*, 345 U. S. 594, 625. But the reverse proposition would surely be extraordinary—that is, that practices which are *illegal* when done individually are *legal* when done concertedly.

Yet, eleven years later in *Rawleigh* v. *Stoomvaart*, 1 U. S. S. B. 285 (1933), essentially that holding was made by the Board. In ruling that its *Eden* decision was inapplicable to a conference agreement, the Board emphasized (*id.*, pp. 290–291) that a dual-rate formula, when used jointly by members of an entire conference instead of by only a single carrier, gave a shipper a "choice of the carriers" *once the shipper had signed the required exclusive patronage contract.* Because of this "choice", a conference dual-rate system—the Board reasoned—was not subject to the same legal infirmity as a dual-rate formula used by a single carrier.

The distinction thus drawn by the Board was rejected in *Intercoastal Investigation*, 1 U. S. S. B. 400, 452 (1935), on the ground that "to permit the members of the Gulf conference to publish and charge

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Board's basic holding is that the dual-rate formula involved there was invalid under Sections 16 and 17.

Fourth, even assuming that the excerpt could be read as holding that an entire conference's dual-rate system does not violate Section 14, Third, such a system would nevertheless be plainly invalid under Sections 16 and 17 as those provisions were construed by the Board in *Eden*. See fn. 14, *supra*.

rates depending upon the execution of exclusive patronage contracts would be permitting them to do collectively what carriers individually are prohibited from doing."[29] See also *Contract Routing Restrictions*, 2 U. S. M. C. 220, 226–227 (1939). But this rationale, as Judge Frank pointed out,[30] has in turn been rejected by later decisions of the Board.

The *Rawleigh* decision was the first in which the Board upheld the legality of a conference dual-rate system.[31] In view of the lapse of seventeen years from the enactment of the statute until the case was decided, in view of the decision's sharp departure from *Eden*, and in view of the varied treatment of *Rawleigh* in subsequent Board decisions, *Rawleigh* can

[29] In *Intercoastal*, where the dual-rate system involved there was held to violate Sections 16 and 18, the Board stated (p. 456):

"The prohibition of discrimination means, among other things, that no difference or distinction shall be made in rates that coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business which under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor."

Plainly, if the statute prohibits any "difference * * * in rates that coerce[s] the public to employ one competitor to the exclusion of another, or deprive[s] one competitor of business which under freedom of selection by the public would be given to it," the Act necessarily prohibits a system which, under the threat of penalty rates, coerces shippers into giving all their business to members of the conference.

[30] See *supra*, note 27, pp. 890–891, fn. 22.

[31] Indeed, not even the *Rawleigh* decision approved the use of a conference dual-rate system as a weapon against nonconference competition. On the contrary, the Board carefully pointed out that the contracts involved there permitted contract shippers to use "not only the 10 conference members but also a nonconference line, the Isthmian line, the only other line regularly in the trade" (p. 290).

scarcely be treated as an authoritative exposition of congressional intent. On the contrary, if Board rulings are to give any weight in that respect, it would appear that they support the decision of the court below, inasmuch as the Board's ruling in *Eden*—decided only six years after enactment of the statute—recognized that a dual-rate formula is unlawful even when used only by a single carrier.

Moreover, in determining the weight to be given to the Board decisions on this matter, it is important to recognize that valid Board approval of the dual-rate system would exempt this anticompetitive device from the antitrust laws. This Court has pointed out (*Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61, 74) that, "Although due consideration is to be accorded to administrative construction where alternative interpretation is fairly open, it is our duty to reconcile such interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress." One of those policies is that "[u]nder the Sherman Act 'competition not combination, should be the law of trade' " (*Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 465)—particularly where, as here, the combination seeks to use its combined economic power against independent competitors.

E. THIS COURT HAS NOT PASSED ON THE VALIDITY PER SE OF THE DUAL-RATE SYSTEM

Petitioners urge (Br. No. 73, pp. 62–69; Br. No. 74, pp. 50–66) that this Court already has determined that the dual-rate system is not illegal *per se* under

Section 14, Third of the Act. They rely on three cases: *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474; *Swayne & Hoyt* v. *United States*, 300 U. S. 297; *Far East Conference* v. *United States*, 342 U. S. 570. In none of them did this Court explicitly decide the question. Two of them, *Cunard* and *Far East*, held that the dual-rate system could not be directly challenged in an antitrust suit, but that the Board's primary jurisdiction must be invoked by filing a complaint under the Shipping Act. *Swayne & Hoyt* did not involve the validity of the dual-rate system under Section 14, Third, but the correctness of the Board's finding that a particular dual-rate system violated Section 16 of the Act.

We submit that the Court of Appeals correctly concluded (R. 244) that "the cases do not decide the point," even inferentially. Indeed, it is hardly likely that this Court would have determined a question which the Conference itself has characterized as "of Paramount Public Importance" (Petition for Writ of Certiorari, No. 740, 1956 Term, p. 9) without explicitly so stating and without fully enunciating the basis for its ruling. We believe that in each of these cases the Court found it unnecessary to reach the question of *per se* illegality: in two of them on the ground that the matter first should be passed upon by the Board, and in the third on the ground that the Board's action in invalidating the particular system could be upheld on a narrower ground without reaching the broad issue.

In the *Cunard* case, the District Court had dismissed a bill by a steamship company seeking to

enjoin, as violations of the Sherman and Clayton Acts, a conference from using a dual-rate system, on the ground that "the matters complained of were within the exclusive jurisdiction of the United States Shipping Board * * *" (284 U. S. at 478–479). In affirming, this Court applied the rule of "primary jurisdiction," previously developed in proceedings under the Interstate Commerce Act, "that questions essentially of fact and those involving the exercise of administrative discretion, which were within the jurisdiction of the Interstate Commerce Commission, were primarily within its exclusive jurisdiction, and, * * * that a remedy must be sought from the Commission before the jurisdiction of the courts could be invoked" (p. 481). The Court pointed out (p. 485) that the allegations in the bill "either constitute direct and basic charges of violations of these provisions [Sections 14, 16, and 17 of the Shipping Act, pp. 483–484] or are so interrelated with such charges as would be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws." The Court rejected the argument that resort to the Shipping Board was unnecessary since "the agreement referred to in the bill of complaint cannot legally be approved," primarily on the ground that "whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the Board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing

and determination would be to usurp that authority" (p. 487).[32]

*Cunard* thus held only that, as long as the allegations upon which the complaint under the antitrust laws was grounded also constituted violations of the Shipping Act, resort initially must be had to the Board, whether "the agreement * * * be lawful or unlawful on its face."

The *Far East* case presented the identical issue, except that the antitrust suit was brought by the Government rather than by a private party. The Court, upon the authority of the *Cunard* case (342 U. S. at 573), held that the matter lay within the Board's primary jurisdiction. It ruled (p. 574) that the matter should be referred to the Board, "even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined."

*Cunard* and *Far East* held only that initially the Board, and not the courts, should pass upon the legality of the dual-rate system under the Shipping Act. But that surely was not equivalent to holding that the Board could approve the system. On the contrary, one of the basic considerations underlying the related doctrines of primary jurisdiction and exhaustion of administrative remedies is the very real possibility

[32] The Court also pointed out (*ibid.*): "Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

that factual issues in the case might render unnecessary the adjudication of broader legal questions (such as the *per se* validity of the dual-rate system). See, *e. g., Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752, 772–774. In addition, even if it should develop that such adjudication is unavoidable after resolution of the factual issues, the agency's analysis of the latter issues will nevertheless provide a concrete background for judicial review of the broader legal questions. Thus, in *Cunard* and *Far East,* the Court presumably wished to have the benefit of the Board's views on such questions as whether there is any difference in the services received by the two shippers who pay the different rates, whether the different rates reflect differences in costs to the conference in serving signing and non-signing shippers, and whether rates in the trade have been stable despite the absence of the dual-rate system. All of those issues were determined by the Board in this case, and it was such an appraisal of the facts which "serve[s] as a premise for legal consequences to be judicially defined," namely, whether the system is illegal on its face.[33]

[33] The fact that the dissenting Justices in *Far East* (in urging that the matter need not be referred to the Board) stated that the dual-rate system was illegal under Section 14, Third (pp. 578–579), does not indicate, as the Conference contends (Br. No. 74, p. 57), that the majority impliedly rejected that view. The majority merely concluded that judicial determination of the question should await "preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts" for determining "issues of fact not within the conventional experience of judges * * *" (pp. 574, 575). In contrast, the dis-

In the third case upon which petitioners rely, *Swayne & Hoyt,* the validity of the dual-rate system under Section 14 was not in issue. The Court upheld the Board's finding that the dual-rate system there involved violated Section 16 of the Act, which makes it unlawful to give "undue or unreasonable" preference or advantages. Since the Court upheld the administrative finding that on the particular facts of that case the system could not be approved, it had no occasion to pass upon the broader issue of the system's *per se* illegality. It cannot be deemed, as the Conference states (Br. No. 74, p. 60), to have "rejected the theory of illegality *per se* which underlay the District Court decision," or to have enunciated the principle that "the legality of dual-rate systems involves a factual determination in each case and that the Board's conclusions in each case must stand 'if there is evidence to support them'." [34]

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senting Justices rejected the majority's view that the doctrine of primary jurisdiction was applicable to the facts of the case.

[34] Nor is there any basis for the Conference's contention (Br. No. 74, p. 62) that footnote 3 to the opinion (300 U. S. at 307) "constitutes a holding that dual-rate systems are not illegal *per se* under § 14, Third" (a provision of the Act not then before the Court). The footnote was to a passing statement by the Court that "the operation of the contract system, in the circumstances of this case, does not differ substantially from that of 'deferred rebates' outlawed in both foreign and coastwise shipping by § 14" (300 U. S. at 307). The footnote suggested that the Alexander Report "did not condemn the contract system completely" (*ibid.*). As has been pointed out, *supra*, p. 42, n. 20, the Court appears inadvertently to have treated a statement of a *contention* in the Report as if it were a statement of the Committee's *conclusions*.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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## APPENDIX

The Shipping Act, 1916, 39 Stat. 728, as amended, 46 U. S. C. 801, *et seq.*, provides in pertinent part as follows:

SEC. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country,—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommo-

dations when such are available, or resort to other discriminating or unfair methods because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth: Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims. [46 U. S. C. 812.]

* * * * *

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification

SEC. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. * * * [46 U. S. C. 816.]

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or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action. [46 U. S. C. 814.]

SEC. 16. That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense. [46 U. S. C. 815.]